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Supreme Court, U.S.
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No. 01-584

In The

# Supreme Court of the United States

WANDA ADAMS, *et al.*,

*Petitioners,*

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR PETITIONERS

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## QUESTION PRESENTED

The petitioners were fired as part of a corporate downsizing in which more than 70% of the persons fired were, like them, at least 40 years old. They alleged that the downsizing disproportionately impacted the older workers within the company. The court of appeals held that the Age Discrimination in Employment Act of 1967 did not under any circumstances permit a disparate impact method of proving age discrimination. The question presented is:

Is a disparate impact method of proving age discrimination available to plaintiffs suing under the ADEA and, if so, under what conditions?

## LIST OF PARTIES

In addition to the persons named in the caption, the petitioners in this proceeding are James Akin, Linda Baldwin, Willis Barnes, Elaine Barnes-Foster, Philip Bassa, Larry Bayes, Patsy Baynard, James Beck, Cheryl Becker, Gary Becker, Cynthia Behrens-Boga, Earl Bettis, Richard L. Boreman, Jerold A. Boyle, Linda Boyle, Gerald Brannen, Joe N. Brannon, Donald Breeden, Donald P. Broeckel, Richard Brown, Lorin Bryan, Robert Bunch, Judith A. Carey, Thomas Catlett Jr., Charles Coffman, Marjorie Copeland, Kenneth Corbett, Earl Doby, Samuel Dupuy, Tom Engers, Gwendolyn Evans, Paul Fintak, Leo L. Floyd, Ray Forehand, Mark Foster, Gregg Frangipane, Robert Freeland, John Fremgen, Valerie Fronza, John Gallagher, Narendra Garg, Mickey Gauldin, Polly Gillespie, Ralph Graves, Linda Groseclose, Michael Harmeling, Thomas Hays, Eugene Hayward, Gopal Hegde, David Hodgson, Peter Holliday, Roy C. Hooks, William E. Hoover, Dayton Jackson, Douglas Janowski, Carrie Jones, William Kenefik, Stephen Koon, Gerald Lamm II, Kermit Lassiter, Saranan Lauck, Thomas Livingston Jr., Raymond P. Long, Linda Maraget, John Mascoll, Robert Mason Jr., Gloria Maxwell, Mary McCoy, Carol McFadden, Annie McKinney, Richard Merriman, James Moock, Michael Moore, David Morris, Thomas Neaman Jr., James L. Owens, William Passmore, Adolfo Paz, James M. Pennington, Mark Petersen, Andre Poulard, Trevor Daniel Putnam, Marcia Quinn, David Reed, Joe Reid, William B. Rich, Alexa Richardson, Terrance W. Ryan, Patti Jo Vitte Schmidt, Lorene Scott, Terrie Scott, Randy Seifert, John



## LIST OF PARTIES – Continued

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The respondents in this proceeding are named in the caption.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 255 F.3d 1322. The opinions of the district court (Pet. App. 19a-30a) are unreported.

## JURISDICTION

The court of appeals entered its judgment on July 5, 2001 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 3, 2001, and granted on December 3, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The relevant portions of the original Age Discrimination in Employment Act of 1967, § 4(a) & (f), 81 Stat. 603 (ADEA), are reprinted at App., *infra*, 1a. The relevant portions of the ADEA, as amended, 29 U.S.C. §§ 621-623, 625-626, 628 & 630, are reprinted at App., *infra*, 3a. The relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, are reprinted at App., *infra*, 18a. The relevant portions of the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d)(1), are reprinted at App., *infra*, 23a. The Equal Employment Opportunity Commission's relevant interpretation of the ADEA, 29 C.F.R. § 1625.7, is reprinted at App., *infra*, 24a. The Secretary of Labor's relevant 1968 interpretation of

the ADEA, 29 C.F.R. § 860.103, 29 C.F.R. § 860.104 (1986), is reprinted at App., *infra*, 26a.

## STATEMENT

The petitioners (the Adams Group) are 117 older former employees of respondent Florida Power Corporation that the company fired during a corporate downsizing. More than 70% of the employees selected for termination were at least 40 years old, and the Adams Group has alleged that the downsizing had a disproportionate impact on the older workers within the company. The question presented in this case is whether—and, if so, under what conditions—older workers may use a disparate impact method of proving age discrimination under the ADEA.

### A. The ADEA: Its Language, Legislative History and pre-*Hazen* Caselaw

Correct construction of the ADEA is aided by an understanding of its language, legislative history, and caselaw arising before *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)—as well as by the amendments to the ADEA imported through the Older Workers Benefit Protection Act of 1990 (OWBPA).

When Congress passed Title VII of the Civil Rights Act of 1964 it also commissioned a study by the Secretary of Labor on age discrimination in the workplace. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964). In his 1965 report to Congress, the Secretary



described arbitrary discrimination based on mistaken assumptions about the effect of age on workers' ability to do their jobs. J.A. 385-90 (U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 pp. 14-17 (1965)). He concluded that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." J.A. 406

Congress subsequently recognized that "older workers find themselves disadvantaged in their efforts to retain or regain employment, [and] that arbitrary age limits and certain other practices may work to the disadvantage of older persons." H.R. Rep. No. 90-805, 90th Cong., 1st Sess. (1967). The ADEA was then enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995).

"[T]he ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *see also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). The express prohibitions of the ADEA make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify * * * employees in any way

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," 29 U.S.C. § 623(a)(2).

As the Court has acknowledged, there "are important similarities between" the ADEA and Title VII of the Civil Rights Act, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. at 584; *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) ("the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace").[1] A noted statutory difference between the ADEA and Title VII, however, is that an action adverse to an employee "because of age," and thus "otherwise prohibited" by the ADEA, is nonetheless lawful "where the differentiation is based on reasonable factors other than

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[1] The prohibitions of Title VII make it unlawful

> for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).



age." 29 U.S.C. § 623(f)(1). Title VII does not have this express exception.

In 1971, the Court issued its opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to address "arbitrary" and other discrimination that could not be detected and proven in the same way as invidious discrimination, and permitted claims to proceed on the basis of a disparate impact model of proof. As an exception to disparate impact liability, the Court held that an employer defending an otherwise adequate disparate impact case would prevail if it established that its challenged practice was based on a "business necessity." Following *Griggs*, multiple courts applied, or assumed application of, the Title VII disparate impact model in ADEA cases: *See, e.g., Monroe v. United Air Lines*, 736 F.2d 394, 404 n.3 (CA7 1984), *cert. denied*, 105 S. Ct. 983 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (CA8 1983); *Allison v. Western Union Telephone Co.*, 680 F.2d 1318, 1321-22 (CA11 1982); *Douglas v. Anderson*, 656 F.2d 528, 531 n.1 (CA9 1981); *Geller v. Markham*, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (CA6 1975); *United Independent Flight Officers v. United Air Lines*, 572 F. Supp. 1494, 1505 (N.D.Ill. 1983). The Department of Labor guidelines issued contemporaneously with the ADEA also suggested that age discrimination claims could be based on facially age-neutral employment actions. 29 C.F.R. § 860.103(f)(1) & (2) (1986), 29 C.F.R. § 860.104(b). (Currently, and for the past 19 years, the EEOC interpretive guidelines have indicated that the "reasonable factors" defense in the ADEA works with the business necessity defense in a disparate impact analysis. The guidelines provide that an employer may

raise the "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." 29 C.F.R. § 1625.7(d)).

In 1989, the Court issued an opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that arguably reduced the burden of a disparate impact defendant in Title VII litigation. *Wards Cove* said nothing, however, to suggest that disparate impact for Title VII or the ADEA did not *exist*, and courts continued to assume that disparate impact applied to the ADEA. Steven Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 258-75 (1990) (discussing prevailing view in 1990). Partially in response to *Wards Cove*, Congress restored the pre-*Wards Cove* version of the disparate impact theory in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A). Congress did not make any similar amendment to the ADEA. As Judge Posner recognized as late as 1992, however, "the weight of authority * * * [was] that disparate impact [was] a viable doctrine under the age discrimination law." *Finnegan v. Trans World Airlines*, 967 F.2d 1161, 1163 (CA7 1992).

Congress amended the ADEA several times since *Griggs*. *See, e.g.*, Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984). Congress has never



acted, however, to restrict or otherwise undermine disparate impact analysis in ADEA cases.[2] *EEOC v. Governor Mifflin School District*, 623 F. Supp. 734, 740-41 (E.D.Pa. 1985). To the contrary, the 1990 Congress (post-*Wards Cove*) amended the ADEA by adding the OWBPA and requiring that employers provide employees with *statistical information* regarding the ages of co-workers offered severance pay (and of those co-workers who were not let go) so that employees could meaningfully determine whether to waive any rights to bring age discrimination claims. 29 U.S.C. § 626(f)(1)(H)(ii), Pub. L. No. 101-433, 104 Stat. 978 (1990).

In 1993, the Court issued its opinion in *Hazen Paper* and suggested in *dicta* that the disparate impact method of proving discrimination available to Title VII plaintiffs might not be available to ADEA plaintiffs. Neither the majority's opinion, nor the concurrence, indicated that disparate impact was wholly unavailable to ADEA plaintiffs—only that Title VII's version of it might not be.

### B. Proceedings Below

The Adams Group consists of 117 former employees of Florida Power Corporation who were at least 40 years old when the company fired them as part of a corporate downsizing that began in 1992 and concluded in 1996. Over 70% of the terminated personnel were over the age

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[2] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. at 580.

of 40, and the Adams Group has alleged that the downsizing disproportionately selected the older workers within the company for elimination. Pet. App. 2a; J.A. 24-25, 298-304; Doc. 67 p. 4.[3] Invoking jurisdiction under 29 U.S.C. § 626(c) and 28 U.S.C. § 1331, members of the Adams Group filed a complaint in the Middle District of Florida and alleged that Florida Power[4] had violated the ADEA in its downsizing activities by (1) willfully discriminating against senior employees on the basis of their age, and (2) disparately impacting older employees, a result that could have been avoided by other means sufficient to satisfy Florida Power's business needs. Pet. App. 2a-3a; J.A. 26-27.[5] The company denied any violation of the ADEA and asserted that it had legitimate, non-discriminatory reasons for firing the Adams Group. Doc. 218 pp. 11-16. Specifically, Florida Power has asserted that it "underwent a series of reorganizations," not to trim the workplace of older workers, but "[t]o prepare for [the] competition" that utility deregulation would bring it within the State of Florida. Brief in Opp. 2.

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[3] Given the procedural posture of the case, the allegations and evidence favoring the Adams Group are assumed true for purposes of this brief. *See* Pet. App. 2a n.1, and *id.* at 3a-4a.

[4] The complaint also names Florida Power's parent, Florida Progress Corporation; for simplicity's sake this brief refers to the respondents collectively as Florida Power.

[5] Since these allegations are the same for each of the members of the Adams Group, reference is simply made to the first instance of ADEA allegations in the complaint (*i.e.*, Wanda Adams), as well as to the first instance of Florida Power's denial of those allegations.



The district court conditionally certified a class in 1996, and potential class members were notified of their right to opt-in to the suit. Pet. App. 3a; J.A. 7-9. The remaining members of the Adams Group then joined the case. Doc. 215 p. 11 n.7. Two years later, Florida Power moved to decertify the class based upon a lack of commonality.[6] Doc. 221; Doc. 229. In opposition, the Adams Group argued that higher-level management at Florida Power had a "single policy" to reduce older workers in the work force—an argument based on the testimony of Florida Power executives as well as the testimony of members of the Adams Group who had access to confidential management documents and meetings.[7] J.A. 297-304 and accompanying exhibits.

The district court decertified the class based upon its determination that (1) disparate impact analysis was not

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[6] And, in its Opposition to Plaintiffs' Petition for Permission to Appeal to the Eleventh Circuit (J.A. 327-30), Florida Power argued that it used "no standard method" in its downsizing, that reductions in personnel "resulted from a number of different factors," that "different decision makers" in its different departments formulated and implemented reductions (*ibid.*), and that evaluations and rankings of employees played a part in the downsizing process (J.A. 348 ex. 2 ¶¶24-30; Doc. 229 pp. 9-12, 21-22 and accompanying affidavits).

[7] For example, the testimony referred to a "statistical evaluation" Florida Power used to "correlate age, years of service, cost of benefits and liabilities at the time of retirement"; and statements a Florida Power vice-president allegedly made that the company needed to "get rid of older people" who "had nothing to contribute to the corporation * * *." J.A. 300-01 and accompanying exhibits.

available under the ADEA, and (2) the class members could not be deemed similarly situated, as required under 29 U.S.C. § 216(b) for certification, unless their claims could be premised on a theory of disparate impact. Pet. App. 3a. The judge certified the question of the existence of ADEA disparate impact analysis to the Eleventh Circuit under 28 U.S.C. § 1292(b) because the question presented a controlling issue of law in the case and, since the circuits were "remarkably divided on the issue" (Pet. App. 24a), he believed there were substantial grounds for disagreement over his decision (*id.* at 2a).

The Eleventh Circuit accepted the case and, in an opinion joined by one member of the panel, affirmed. *Id.* at 8a. The court based its decision on four grounds. First, the ADEA's exception for "reasonable factors other than age" does not exist in Title VII. *Id.* at 6a. Second, the court determined that this ADEA exception is similar to an exception in the remedial provisions of the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1)(iv), and that this Court had interpreted the EPA's exception to preclude disparate impact claims. Pet. App. 7a. Third, the court of appeals found that the legislative history of the ADEA was unlike the legislative history of Title VII because the Secretary of Labor's report preceding enactment of the ADEA "recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Ibid.* Finally, the court stated that the decision in *Hazen Paper* suggested that no disparate impact claim could be brought under the ADEA.



In a special concurrence, Judge Barkett disagreed with the panel's analysis and concluded that "disparate impact can be pled and proved in an appropriate case under the ADEA, and that it cannot be said as a matter of law that this theory can never be used in an age discrimination case.[8] She pointed to the similarities of the policies behind Title VII and the ADEA and argued that the ADEA's exception for "reasonable factors other than age" added nothing beyond what the Court had required in *Griggs* for Title VII plaintiffs, *i.e.*, that the challenged practice is either "not founded on 'business necessity,' or lacks 'a manifest relationship to the employment.' " Pet. App. 11a-12a (quoting *Griggs*, 401 U.S. at 431).

Noting that the EEOC interpretive guidelines, 29 C.F.R. § 1625.7(d), are entitled to judicial deference,[9] the concurrence found that the guidelines suggest the ADEA's reasonable factors defense works in tandem with

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[8] Judge Barkett would have affirmed based upon her determination that the Adams Group had not yet sufficiently alleged disparate impact and that the court of appeals was thus making a "pronouncement in the abstract." Pet. App. 9a. Without reaching the sufficiency of the disparate impact allegations, the majority retorted that Judge Barkett's position was "inconsistent with the posture of the case. * * * Indeed, because the district court certified only the question of law to us, a 'pronouncement in the abstract' is required." *Id.* at 2a n.1.

[9] Pet. App. 12a n.4 (citing *Edwards v. Shalala*, 64 F.3d 601, 606 (CA11 1995) (" 'An agency's interpretation of an ambiguous provision within a statute it is authorized to implement is entitled to judicial deference.' ") (quoting *Jones v. Runyon*, 32 F.3d 1454, 1457-58 (CA10 1994)); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 696-98 (1991); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984)).

Title VII's business necessity defense. Pet. App. 12a. Additionally, the concurrence observed that Congress had amended the ADEA several times after federal courts had held that disparate impact was available to ADEA plaintiffs, yet Congress had never sought to exclude disparate impact claims. *Id.* at 13a.

With respect to the asserted similarity between the exceptions found in the EPA and the ADEA, the concurrence made two distinctions: First, the question of disparate impact concerns the substantive provisions of the ADEA, which are similar to the substantive provisions of Title VII, not the remedial provisions of the EPA. *Id.* at 14a. Second, the EPA exception permits pay discrepancies for "any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv), and thus requires only a neutral explanation for pay disparity to ensure that employers can only be liable for "intentional purposeful discrimination." Pet. App. 14a. The ADEA exception requires, however, that the employer take the additional step of showing the *reasonableness* of the neutral factor. *Id.* at 14a-15a.

Finally, with respect to the Secretary of Labor's 1965 report preceding enactment of the ADEA, the concurrence acknowledged that the "report differentiated between what it termed 'arbitrary discrimination' based on age and problems resulting from factors that 'affect older workers more strongly, as a group, than they do younger employees.' " *Id.* at 18a. Unlike the majority, however, the concurrence did not conclude that this differentiation precluded disparate impact claims. "The very question disparate impact analysis seeks to answer is whether the challenged policy that disproportionately



impacts older workers is derived from a reasonable business judgment or whether the policy is the result of arbitrary discrimination." *Ibid.*

## SUMMARY OF ARGUMENT

Some employment practices adopted without a deliberately discriminatory motive may, in operation, be functionally equivalent to intentional discrimination. The disparate impact method of proof allows plaintiffs to show, inferentially, that such discrimination has occurred. The language of the ADEA both expressly and implicitly permits plaintiffs to use a disparate impact method to establish that discrimination has occurred.

Expressly, the ADEA prohibits an employer from *limiting or classifying* its employees in any way that would adversely *affect* any individual's status as an employee because of such individual's age. The prohibition does not mention the word "discriminate," and the Court has already construed identical language to authorize plaintiffs to use the disparate impact method.

Implicitly, the ADEA recognizes unintentional discrimination because it provides an affirmative defense if an employer has taken an "otherwise prohibited" action differentiating between younger and older workers, and excuses the action if the differentiation was based on "reasonable factors other than age." Thus, if the differentiation were based on age-neutral factors there would be no defense for the prohibited action unless the factors were also reasonable. If the ADEA only prohibited *intentional* discrimination, the defense could never apply

because the differentiation would *always* be based on age. To give effect to the actual words of the ADEA, there must be a cause of action for unintentional discrimination, and proof of disparate impact fills the evidentiary void to establish such discrimination where there is an unreasonable, albeit age-neutral, basis for differentiation.

Title VII has incorporated a defense from the Equal Pay Act that—with one critical difference—is substantially identical to the "reasonable factors other than age" defense in the ADEA. The Title VII defense applies to claims of sex-based wage discrimination where the differential is based on any "factor other than sex." The Court has held that the defense works with Title VII's prohibitions against sex discrimination—which are identical to the ADEA's prohibitions against age discrimination—where plaintiffs seek to prove sex discrimination claims based on disparate impact. The defense, which lacks the ADEA qualifier "reasonable," precludes such claims from succeeding, provided that the asser ed "factors" are bona fide and sex-neutral. The standard for age-neutral actions having a disparate impact on older workers must logically be higher.

The administrative agencies charged with interpreting the ADEA have long interpreted the Act to require considerably more than mere facial age neutrality, and the current regulations of the EEOC expressly address employment practices that have an "adverse impact on individuals within the protected age group." Until *Hazen Paper*, courts had consistently held or assumed that disparate impact was an available means of proof. Congress has never acted, however, to stop older workers from using the disparate impact method in ADEA cases.



Instead, Congress passed the OWBPA in 1990 and required employers to provide statistics that employees terminated in corporate downsizings could use to assess whether to litigate claims under the ADEA or accept termination packages that waived any right to bring such claims. Since employees terminated in downsizings—unlike employees terminated on an individual basis—have no reason to suspect that the termination is directed toward them personally, and terminated workers cannot make a prima facie case of disparate treatment based on statistics alone, the statistical requirement reflects a Congressional endorsement of disparate impact claims. Given that Title VII itself does not require employers to provide such statistics, it would be peculiar that downsized workers covered by the ADEA—the only workers provided a statistical tool permitting them to assess whether they have a disparate impact case—were not allowed to use their statistics for disparate impact claims.

The meaning of "reasonable factors" under the ADEA may be the most challenging item for the Court's consideration in this case. Given the ambiguity of the term, however, the petitioners suggest that the Court should defer to the EEOC's interpretation. Alternatively, the Court may find disparate impact plaintiffs are in the same substantive position that Title VII plaintiffs were in between *Wards Cove* and the enactment of the Civil Rights Act of 1991. Or, the Court may adopt a different position in keeping with the language of the ADEA. In any event, the burden of proving that an employer's actions differentiating between younger and older workers were "based on reasonable factors" should be with the employer, as it is with other affirmative defenses.

Here, the Adams Group contends that Florida Power's downsizing disproportionately selected the older workers within the company for termination. Florida Power responds that it based its decision to downsize on a belief that it should prepare for deregulation of the utility industry in Florida, which was to occur in the foreseeable future. If this case proceeds to trial on the disparate impact theory, the Adams Group should prevail if the evidence shows Florida Power's downsizing disproportionately terminated the company's older workers and that either (a) age truly was a factor in the company's decision to downsize; or (b) the decision to downsize was not based on reasonable factors. The first of these "reasonable factors" considerations might be established by showing that the downsizing actually increased the company's size, but substantially reduced the median age in the company's workforce. Depending on how the Court construes the term "reasonable factors," the second might be shown by evidence that (for example) a person knowledgeable in Florida's utility industry at the time of downsizing would have known there was no reason to prepare for deregulation because it was abundantly clear that deregulation was not going to occur within the State anytime in the foreseeable future.



## ARGUMENT

### I. THE ADEA PERMITS OLDER WORKERS TO PROVE AGE DISCRIMINATION THROUGH DISPARATE IMPACT

Because "employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination," *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988), the disparate impact model exists to detect inferentially those "decisions that reflect 'inaccurate and stigmatizing stereotypes,' " *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1080-81 (CA7 1994) (Cudahy, J., dissenting) (quoting *Hazen Paper*, 507 U.S. at 604). Some arguments regarding whether disparate impact is an available means of proof under the ADEA focus on legislative history, others on policy, and still others on regulations enacted contemporaneously with, and subsequently to, the passage of the Act. Before addressing those extra-textual arguments, however, an examination of the written language of the Act is appropriate. *See Duncan v. Walker*, 530 U.S. 167, 121 S. Ct. 2120, 2124 (2001) ("We begin, as always, with the language of the statute."); *see also Carter v. U.S.*, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text, not by 'psychoanalyzing those who enacted it.' " (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), and quoting *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in judgment)).

### A. Giving Effect to the ADEA's Written Words

#### 1. The ADEA expressly permits claims based on disparate impact.

The most conventional argument that disparate impact is available under the ADEA rests on the Act's provision that an employer may not "limit, segregate, or classify his employees in any way which would * * * adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). This prohibition does not use the word "discriminate," but instead "imposes liability for employment practices that 'adversely' affect an employee's 'status', and nowhere includes an intent requirement." Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 517 (1995); *see generally* Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984) (the ADEA expressly permits claims based on disparate impact). In short, by prohibiting practices that "adversely affect" older employees, the ADEA prohibits decisions having an "adverse impact" on older employees. Since identical language under Title VII, 42 U.S.C. § 2000e-2(a), supports recognizing disparate impact claims, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 137 n.13 (1976), the language under the ADEA supports disparate impact claims as well.

In a note cited in the *Hazen Paper* concurrence, 507 U.S. at 618 (Kennedy, J., concurring), a law student made a largely grammar-based argument to the contrary:

> [S]ection 4(a)(2) [of the ADEA, 29 U.S.C. § 623(a)(2)] could be read to authorize disparate impact claims. * * * There are two possible interpretations of section 4(a)(2), with the correct interpretation depending upon what the clause "because of age" modifies. *If "because of age" modifies the verb "affect," the section prohibits employers from classifying employees in a manner that adversely affects their employment status because of their age. Such an interpretation could be seen as authorizing disparate impact claims.* Alternatively, the "because of age" clause could be read to modify "limit, segregate, or classify," in which case the provision prohibits classifying employees because of their age, so as to adversely affect their employment status. This interpretation authorizes only claims of disparate *treatment*.



> There are a number of indications that this latter interpretation is the proper one. *First, only the latter construction is grammatically correct.*

Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 842-43 (1982) (emphasis added) (footnotes omitted).[10] The note

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[10] The note made an additional argument working from the premise that section 4(a)(1) only applied to intentional discrimination in light of its "because of age" language and that—since section 4(a)(1) was a parallel provision—it would be incongruous to construe the provisions differently. Krop, 34 STAN. L. REV. at 843. The lack of incongruity is better read as a lack of redundancy, and, as discussed below, the "because of age" language does not foreclose disparate impact. The note also made a policy argument that "it would have been anomalous for Congress to authorize disparate impact in section 4(a)(2)," which does not apply to job applicants, because applicants were the "most likely to benefit from such a claim." *Ibid.* Speculations about policy cannot trump the written words

explained its assertion that only the proposed construction was "grammatically correct" as follows:

> The comma preceding the "because of age" clause suggests that Congress intended the provision to modify the clause setting forth the prohibited conduct. Thus, the sentence would prohibit an employer from classifying an employee because of such individual's age in any way that would deprive him of employment opportunities or otherwise adversely affect his status as an employee. This construction clearly addresses only disparate treatment. Any other interpretation renders the comma superfluous.

*Id.* at 843 n.27. Accordingly, the note concludes, section 4(a)(2) should be read to "prohibit an employer from classifying an employee because of such individual's age in any way that would deprive him of employment opportunities or otherwise adversely affect his status as an employee."[11] *Id.* at 843. This interpretation might seem reasonable, but that is *not* what the statute says.

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of the Act, however. *Great-West Life & Annuity Ins. Co. v. Knudson*, ___ U.S. ___, 2002 WL 15399 (January 8, 2002) ("It is, however, not our job to find reasons for what Congress has plainly done; and it is our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect"). As discussed below, Congress has plainly *not* done what the writer proposes.

[11] The court in *Mullin v. Raytheon Co.*, 171 F.3d 710, 710 (CA1 1999), and a special opinion in *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (CA3 1995) (opinion of Greenberg, J.), applied this grammatical argument, and Florida Power cited the argument in its brief in opposition to certiorari. Brief in Opp. 13.



The irony of the "grammatical" argument becomes startlingly clear once the argument is applied to the written statute, rather than the note's reconstructed version of the law. The statute provides:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* age.

29 U.S.C. § 623(4)(f)(1) (emphasis added). So, to apply the reading that the note calls for to the *actual* statute would result in the following, quite incongruous, text:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* [because of such *individual's* age] in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee.

The lack of linguistic agreement is obvious, and the reading does violence to both logic and language. The far more reasonable reading is:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any *individual* of employment opportunities [because of such *individual's* age] or otherwise adversely affect his status as an employee, because of such *individual's* age.

The note actually acknowledged this construction, observing that "[t]he 'because of age' clause could also be seen as modifying the entire phrase 'deprive or tend to

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.' " Krop, 34 STAN. L. REV. at 843 n.26. However, the author rejected this reading because then the "entire phrase amounts to no more than saying 'adversely affect.' " *Ibid.* Perhaps so, but that is by far the more grammatical—and more plausible—reading of section 4(a)(2).[12] Once beyond the hurdle that "because of such individual's age" refers to the concept of "affect," even the adverse writer acknowledged that "[s]uch an interpretation could be seen as authorizing disparate impact claims." *Id.* at 842-43.

**2. The ADEA's prohibitions and related affirmative defenses strongly indicate that disparate impact is an available means of proving age discrimination.**

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " *TRW Inc. v. Andrews*, 122 S. Ct. 441, 449 (2001) (quoting *Duncan*, 533 U.S. at ___, 121 S. Ct. at 2125 (citations omitted)). And

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[12] There should not be much difficulty in accepting this construction, given the phrase "or *otherwise* adversely affect." The phrase is similar to the language in *parallel* section 4(a)(1) "or *otherwise* discriminate." Terms like "or otherwise" at the end of these sorts of serial listings reflect a catchall phrase that follows specific examples. *See, infra*, n.18 (discussing "catch-all" phrase "any other factor other than" located at end of serial listing (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)).



"every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Washington Market Co. v. Hoffman*, 11 Otto (101 U.S.) 112, 116 (1879). Of course, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context")); *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 (1989) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")).

**a. The terms "because of" and "based on" do not mean the same thing in the ADEA.**

The ADEA expressly prohibits an employer from taking adverse actions against an older worker "*because of* such individual's age." The same section then provides, however, that an employer may take these "otherwise prohibited" actions if:

(1) age is a legitimate qualification for the job;

(2) "the differentiation is *based on* reasonable factors other than age;" or

(3) the work is done in a foreign country with laws in conflict with the ADEA's prohibitions.

29 U.S.C. § 623(f)(1) (emphasis added). The first and the last of the defenses clearly operate from their shared

premise that "otherwise prohibited" age discrimination has occurred. The middle defense—reasonable factors other than age—operates from the same, shared premise, but its operation is less obvious. It provides that employers may discriminate against older workers "because of age" if the differentiation between older and younger workers is "based on reasonable factors *other than* age." Since the defense does not permit employers to differentiate based on reasonable factors *in addition to* age,[13] the reasonable factors that employers base their actions upon must not include age. Superficially, at least, the defense may seem redundant to the prohibition, or even nonsensical, but the canons of construction compel another reading—one that gives effect to Congress's words.

If the terms "because of" and "based on" carried the same meaning, the "reasonable factors" defense would have none because violation of the prohibition would *expressly* preclude the defense's application: The ADEA would prohibit an employer from discriminating against

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[13] The "in addition to" language is just an example. Had the phrase not been "other than age," then age arguably might have been a permissible, concurrent consideration if Congress had said "as well as age," "beyond age," "besides age," or "regardless of age." But Congress chose to say "other than age," and the meaning is exclusionary. That meaning is particularly clear since the first defense—which permits age to be a basis to discriminate in employment—and the second defense—which permits factors "other than age" to be a basis to discriminate in employment—operate as complimentary counterparts, and because there is no reason to believe that Congress intended to permit discriminatory employment actions that were *consciously* age-based, other than those clearly set forth in the ADEA.



an older worker *because of such individual's age* except where the differentiation was *not because of age* and was because of reasonable factors; or, from discriminating against an older worker *based on the employee's age* except where the differentiation was *not based on age* and was based on reasonable factors. Satisfaction of the premise for triggering the defense (the occurrence of a prohibited action) would inherently defeat the defense's application. Thus, to give effect to the reasonable factors defense, the terms "because of" and "based on" cannot carry the same meaning.

There is, as well, a textual reason why the terms cannot carry the same meaning in the ADEA. As this Court said long ago, "[i]t is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' " *Neal v. Clark*, 5 Otto (95 U.S.) 704, 705 (1877). More recently, the Court described the "well settled" rule that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 530 U.S. ___, 121 S. Ct. at 2125 (internal quotation marks omitted) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Given the proximity and textual interrelationship of the terms "because of" and "based on," they cannot carry the same meaning in the ADEA. Congress presumably acted intentionally and purposefully in including each term and excluding the other where the terms were used.

Just as interrelated *identical* words used in close proximity should be construed to have the same meaning, interrelated *different* words used in close proximity should be construed to have different meanings. *Cf. C.I.R. v. Lundy*, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)))).

Acknowledging that the terms "because of" and "based on" possess different meanings in the ADEA requires a determination of what those meanings should be. Etymologically, "based on" and "because of" are quite different: "based on" requires a principal component or foundation—a requirement that would appear to require intent where, as here, the term is combined with a reliance on "reasonable factors." The term "because of," in contrast, reflects a cause and effect relationship that can subsume both intentional and unintentional conduct.[14] For example, one may be late for work *because of*

[14] The term "because of" comes from the Middle English *bi cause of*. AMERICAN HERITAGE DICTIONARY (4th ed. 2000). The primary meanings of "cause" are "1a. The producer of an effect, result, or consequence. b. The one, such as a person, event, or condition, that is responsible for an action or result." *Ibid.* The secondary meaning of "cause" is "2. A basis for an action or response; a reason." *Ibid.* The term can thus be used as part of an explanation for "an effect, result, or consequence," and as the explanation for action taken with a conscious "basis" or "reason."



an accident, and there would be no intent for tardiness. It would be unusual, however, to say that one is late for work *based on* an accident; an action *based on* something ordinarily involves intent. *Cf. United Food and Commercial Workers Union v. Brown Group*, 517 U.S. 544, 550 (1996) ("the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.").

### b. The reasonable factors requirement

The ADEA's reasonable factors defense permits an employer to discriminate because of age if the differentiation between older and younger workers is not *based on* age. Giving meaning to the defense suggests that the prohibition applies to both intentional and unintentional discrimination, and thus supports a reading of the ADEA that permits plaintiffs to use the disparate impact method of proof. Perhaps, however, the clearest way of seeing that disparate impact applies to the ADEA is not by understanding what the defense permits—but what it leaves prohibited subject to the other ADEA defenses.

The reasonable factors defense applies only if the factors upon which an employer based its discriminatory action were both (a) not age and (b) "reasonable." The necessary corollary to this defense is that it does not apply if the employer based its action on factors that were *not* "reasonable" even if the factors were "other

than age."[15] There is, accordingly, the statutory potential for liability if the employer based its actions upon unreasonable age-neutral factors.

The analysis cannot stop there, of course, or else employers could be liable under the ADEA *merely* for taking adverse actions against employees based on unreasonable factors—and *this* would ignore the statutory requirement that the adverse action be "because of" age. In other words, the mere fact that an older worker loses his job based on an unreasonable factor fails to prove that the termination was "because of age." As the Court observed in *Hazen Paper*, an employer may fire an employee because of race, but this would hardly be a matter of *age* discrimination. *Hazen Paper*, 507 U.S. at 612. Disparate impact fills the evidentiary void.[16] *See Watson*, 487 U.S. at 987 ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination"); *Connecticut v. Teal*, 457 U.S. 440, 458-59 (1982) (Powell, J., dissenting) ("In disparate-impact cases,

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[15] The meaning of "reasonable factors" under the ADEA is discussed below in Section II of the Argument.

[16] Disparate treatment may, as the Court said, "capture[ ] the essence of what Congress sought to prohibit in the ADEA," *Hazen*, 507 U.S. at 610, but—contrary to the analysis of *post-Hazen* courts—this does not mean that disparate impact is inapplicable as a means of *proving* discrimination. *Cf. International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.") (citing 110 Cong. Rec. 13088 (1964))).



by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs."); *EEOC v. Francis W. Parker School*, 41 F.3d at 1080-81 (Cudahy, J., dissenting) ("[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes.' This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw.") (quoting *Hazen Paper*, 507 U.S. at 604).

### B. The Bennett Amendment to Title VII

#### 1. The True Meaning of *Gunther*

The Court's analysis in *County of Washington v. Gunther*, 452 U.S. 161 (1981), also suggests that disparate impact is available under the ADEA. In *Gunther*, female prison guards sued under Title VII alleging pay discrimination. Their allegations would not have stated claims under the Equal Pay Act (EPA) because their job duties were not "equal" to those of male prison guards—a requirement for EPA liability.[17] *Id.* at 166. The defendant argued that the Bennett Amendment, which provides that there is no action under Title VII for conduct "authorized" by the EPA, 42 U.S.C. § 2000e-2(h) (1994),

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[17] They could not even attempt to bring an EPA claim because—as municipal employees—the factual basis for their allegations preceded the effective date of the Act. *Gunther*, 452 U.S. 164 n.3.

precluded Title VII liability. The Court rejected the argument on the rationale that conduct was not authorized merely by not being prohibited; that conduct was only *authorized* if a statutory defense permitted it. 452 U.S. at 168-69. The Bennett Amendment, the Court held, did nothing more than incorporate the EPA's defenses into Title VII. *Id.* at 169-70.

The dissent countered that this reading of the Amendment rendered it meaningless because (a) Title VII prohibited intentional sex discrimination; and (b) the EPA included a defense that authorized pay differences based on any "factor other than sex." *Id.* at 199-200 (Rehnquist, J., dissenting). Thus, the dissent argued, if sex motivated the pay difference, there could be no possible application of the defense. *Ibid.* The majority responded that the incorporation of the "factor other than sex" defense into Title VII was not rendered meaningless because it would apply to disparate impact cases. *Id.* at 170-71. Without elaboration, the Court explained that the employer could avoid liability by establishing the sex neutrality and bona fides of the factors. *Ibid.*

The *prohibitions* of the ADEA were taken directly from the prohibitions of Title VII. Apart from the critical word "reasonable," the "factor other than sex" defense incorporated into Title VII by the Bennett Amendment is substantially similar to the "reasonable factors other than age" defense in the ADEA.[18] The Court's analysis in

[18] Its interaction with its co-listed defenses is also different: given its placement at the end of the series, and its preceding phrase "any other" before "factor other than," it serves as a general "catch-all" provision, *Corning Glass Works*, 417 U.S. at 196, to the EPA and, by extension, to Title VII.



*Gunther* should thus apply to permit disparate impact under the ADEA. As one commentator said:

> *Gunther* is virtually controlling on this issue [of disparate impact under the ADEA]. Indeed, it raises and answers an identical question cast in a different statutory scheme. The similar "factor other than . . . " defense was given meaning by the *Gunther* court based on the assumption that the substantive prohibitions to which it applied imposed liability premised on impact. If that is true in this complex intersection of Title VII and the Equal Pay Act, it would seem equally true under the ADEA, particularly given the injunction that resolutions of Title VII language will be given similar construction under the ADEA.

Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That Is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 833-35 (1997).

Ironically, some courts have used *Gunther* to argue that disparate impact is not available under the ADEA. *See, e.g., Adams*, 255 F.3d at 1325; *Mullin*, 164 F.3d at 702; *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (CA10 1996), *cert. denied*, 517 U.S. 1245 (1996). They overlook that the reasonable factors defense is an affirmative defense working from the premise that a violation has already occurred. Having made this error, they suggest that the prohibition and the reasonable factors provision can only be read together as a means of making clear that the ADEA prohibits disparate treatment and permits disparate impact.

**2. Yes, the Reasonable Factors Defense is an Affirmative Defense.**

In its Brief in Opposition, Florida Power argued that the reasonable factors defense was not a defense at all, but merely a definitional provision:

> Petitioners similarly err in contending that the "reasonable factors other than age" provision in Section 623(f)(1) must be construed as an affirmative defense against disparate impact claims. Pet. 20-21. This provision is better understood to be a "definitional provision" that "delineates which employment practices are illegal and thereby prohibited and which are not," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (interpreting Title VII), just as this Court held that the "bona fide employee benefit plan" provision in an earlier version of Section 623(f)(2) was a definitional provision and not an affirmative defense. *See Ohio Pub. Employee Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989).

Brief in Opp. 13. There are several flaws with this argument. First, and most importantly, defenses in Section 623(f)(1) are preceded by the words "it shall not be unlawful for an employer * * * to take any action *otherwise prohibited* under [the preceding subsections] of this section where * * * ." The most reasonable construction of this language is that it only applies where there has been a violation of the ADEA's prohibitions.

Second, the bona fide employee benefit plan provision found in an earlier version of Section 623(f)(2), and referred to in the *Betts* decision, was indeed a definitional provision and not an affirmative defense. *Betts*, 492 U.S.



at 181. That pre-*Betts* version of Section 623(f)(2) provided:

> It shall not be unlawful for an employer * * * to observe the terms of a bona fide seniority system or any bona fide benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual.

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 81 Stat. 603 § 4(f)(2) (1967). Nothing in the language suggested that it applied only where there had been an *otherwise prohibited* action. The provision simply explained—or defined—the reach of the Act.[19]

Third, the Title VII definitional provision discussed in *Hardison* delineating which employment practices are illegal, and thereby prohibited, and which are not, provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * * .

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[19] Today, of course, Section 623(f)(2) contains the same prefatory "to take any action *otherwise prohibited* under [the preceding subsections] of this section" language that begins Section 623(f)(1).

*Hardison*, 432 U.S. at 81-82 (quoting 42 U.S.C. § 2000e-2(h)). Again, there is no premise that there has been an actual violation, only an explanation that "notwithstanding" anything else Title VII states, certain actions are not unlawful employment practices.

### C. Administrative History

In 1968, the Department of Labor issued guidelines to interpret the then newly-enacted ADEA. Those guidelines recognized that employment practices that adversely affect older workers are prohibited by the ADEA unless required by the job being performed. For example, Department guidelines stressed that in the case of physical requirements, employer action affecting older workers must be "reasonably necessary for the specific work to be performed." *See* 29 C.F.R. § 860.103(f)(1)(i) (1986). Similarly, factors used to evaluate employees had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(2). The regulations also required that employment practices be "fair and reasonable" and "specifically related to the requirements of the job." 29 C.F.R. § 860.104(b). They further provided that the use of tests would be scrutinized because of the risk that older workers might suffer from a lack of recent testing experience even though they had the abilities required for the job. *Ibid.*

Because they recognized the principle of disparate impact, the Department guidelines generally scrutinized employer actions without any regard to motivation or intent. And the guidelines expressly required that



employer practices be reasonably related to job requirements even if they were otherwise applied "equally" and "uniformly" to employees "regardless of age." *See* 29 C.F.R. § 860.103(f)(1)(i), (f)(2). It is also telling that the regulations expressly limited employment testing—the same practice that prompted the Court to recognize disparate impact in *Griggs*.

The Department of Labor's interpretation is particularly persuasive given the Department's key role in the statute's enactment, as well as the fact that the regulations were promulgated shortly after passage of the ADEA. *See Bingler v. Johnson*, 394 U.S. 741, 749-50 (1969) (agency's interpretation accorded greater weight when made contemporaneously with law's enactment). Notably, the same Secretary of Labor whose report to Congress prompted enactment of the ADEA—Willard Wirtz—was Secretary when the Department issued the guidelines.[20]

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[20] The significance of the Secretary's 1965 report itself, however, has been somewhat overblown. The two leading ADEA anti-disparate impact cases, *Mullin* and *Ellis*, relied on the report's concern with "arbitrary discrimination" as proof that Congress enacted the ADEA to bar only intentional discrimination. *Mullin*, 164 F.3d at 703; *Ellis*, 73 F.3d at 1008. The Secretary's report *does* provide some insight into the origins of the ADEA, but hardly eliminates the viability of disparate impact—especially given that the report was issued seven years before *Griggs*. *See Griggs*, 401 U.S. at 431 (purpose of disparate impact is to deal with arbitrary discrimination); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1215 (CA7 1987) (Easterbrook, J., dissenting) (same); *see also Brett Ira Johnson, Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303, 337-38 (arbitrary does not mean intentional). To the extent that

Administration of the ADEA was transferred to the Equal Opportunity Commission in 1979. Reorganization Plan No. 1 of 1978, 92 Stat. 3781, *reprinted in* 5 U.S.C. app. at 1155 (1982).[21] The EEOC affirmed the viability of disparate impact analysis in terms even more explicit than those used by the Department. The EEOC guidelines relevantly provide:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees * * * on the ground that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

29 C.F.R. § 1625.7 (1999). This section has been in effect for over 19 years. It supports not only disparate impact, but also the business necessity requirement that the Court recognized in *Griggs*.

The EEOC's interpretation is entitled to considerable deference. *See, e.g., Griggs*, 401 U.S. 433-34 (The EEOC, "having enforcement responsibility, has issued guidelines interpreting [Title VII] to permit only the use of job-related tests. Administrative interpretation of the Act by

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the report suggests anything about disparate impact, it is hardly binding. To the extent it is persuasive, however, the *amicus curiae* brief of the American Association of Retired Persons correctly analyzes the report and makes clear that an accurate and *complete* reading supports disparate impact analysis under the ADEA.

[21] Since it lacked authority to administer the ADEA in 1978, the EEOC expressly excluded the ADEA from disparate impact guidelines it issued that year.



its enforcing agency is entitled to great deference."); *Western Airlines v. Criswell*, 472 U.S. 400, 412 (1985) ("consistent interpretation" of the ADEA by the Secretary of Labor and EEOC entitled to deference"). Deference is especially appropriate because the decades-old interpretation has not been altered by Congress, notwithstanding the amendments of the ADEA in the intervening years. *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.").

### D. The Statistics the OWBPA Requires for Downsized Employees Have Little if any Meaning for those Employees Apart from Consideration of Disparate Impact Claims.

In 1987, the Court issued its opinion in *Wards Cove* and seemingly altered the nature of disparate impact under Title VII. 490 U.S. at 659-61. There was never any dispute, however, that disparate impact continued—only what the nature of disparate impact analysis would be. There was also an apparent unanimity that disparate impact continued to apply to the ADEA, Kaminshine, 42 Fla. L. Rev. at 258-75 (discussing prevailing view in 1990), and the Department of Labor (and later the EEOC) had been issuing regulations for over 20 years indicating that disparate impact was available under the ADEA. Against this backdrop, Congress passed the Older Workers

Benefit Protection Act of 1990 (OWBPA) to amend the ADEA and add protections when employers downsize. 29 U.S.C. § 626(f).

When they downsize, it is customary for employers to provide special incentive packages to terminated employees in exchange for releases of legal rights—including rights under the ADEA. Passage of the OWBPA was prompted by concerns that employees may, when they are asked to sign such waivers, lack information to assess meaningfully whether their rights under the ADEA are being violated.[22] As the Committee Report emphasized:

> [E]mployees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is not a function of their individual status. Under these circumstances, the need for adequate information and access to legal advice before waivers are signed is especially acute.

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[22] Florida Power used such packages with releases during the downsizing in this case. In its original answer to the complaint, the company alleged counterclaims against several plaintiffs based on the releases. (Doc. 7 pp. 97-112). The plaintiffs moved for summary judgment because the releases failed to advise employees to seek the advice of legal counsel and provide the employees statistical information, as required by the OWBPA. (Doc. 30 p. 5). The district court found the releases invalid under the OWBPA based on the failure to advise the plaintiffs to seek counsel. The court did not address the other grounds the plaintiffs asserted for invalidation. (Doc. 215 pp. 18-21).



S. Rep. No. 101-263, S. 1511, 101st Cong., 2d Sess., at 33-34. The OWBPA accordingly established three safeguards to ensure that downsized employees could make informed decisions when asked to waive their rights under the ADEA.

First, when waivers are sought from a "group or class of employees," the employees must be given at least 45 days to consider the waiver agreement. 29 U.S.C. § 626(f)(1)(F)(ii). Second, the waiver agreement must contain specified provisions, including express advice to "consult with an attorney prior to executing the agreement." 29 U.S.C. § 626(f)(1)(E). Third, when an employer seeks waivers as part of a termination program offered to a group of employees, the employer must provide in writing "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. 29 U.S.C. § 626(f)(1)(H)(ii). As the Senate Report explained:

> The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination * * * programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

S. Rep. No. 101-263, at 33-34. In short, "Congress's intent in enacting § 626 was to compel employers to provide data so that an employee considering waiving ADEA rights could assess, with the assistance of counsel, the viability of a potential ADEA claim." *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1259 (CA6 1977), *cert. denied*, 522 U.S. 1107 (1998). The OWBPA's disclosure requirements have, accordingly, been strictly enforced. *See Oubre v. Entergy Operations*, 522 U.S. 422, 426-28 (1998).

When Congress required employers to provide age-impact data to employees terminated in downsizings with the specific advice that the employees seek counsel, Congress reflected its understanding that age-impact data was vital to counsel assessing a client's potential claims under the ADEA. As Professor Alfred Blumrosen, Ruth G. Blumrosen, and their colleagues recently observed:

> Only if the statistical information bears heavily on the question of employer liability can counsel give well grounded advice as to whether to take the money and waive ADEA rights. A reasonable estimate of the likelihood of discrimination can be made on the basis of the statistics only if the disparate impact doctrine applies. It cannot be made if the plaintiff must prove disparate treatment.

*See* Alfred Blumrosen, *et al.*, *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 983 (1998). The Blumrosens are co-counsel for the Academy of Florida Trial Lawyers, an *amicus curiae* in this case. The Academy's thorough analysis of the OWBPA persuasively demonstrates that disparate impact is available under the ADEA in the context of corporate downsizings, even if not in all cases.



### E. The Subjectivity of Florida Power's Downsizing Process Further Militates in Favor of Using the Disparate Impact Method in this Case.

Virtually all disparate impact decisions of the courts of appeals have been rendered in cases where employees challenged the effects of objective employment criteria. But disparate impact analysis may serve an additional role when employers downsize based on subjective criteria—a role that goes to the heart of the ADEA. *Compare Watson*, 487 U.S. 998-90 ("It does not follow * * * that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain * * * .") *with Hazen Paper*, 507 U.S. at 610 (discussing role of the ADEA in addressing employment actions taken "on the basis of inaccurate and stigmatizing stereotypes."). Given that Florida Power's method of downsizing was so subjective (J.A. 327-30), it would be extremely challenging for many members of the Adams Group to prove discrimination by disparate treatment even if they were dismissed because of a culture of ageism that subtly pervaded the workplace. By permitting workers like them to use the disparate impact method of proof, the Court would address the concern it expressed in *Watson* about "an employer's undisciplined system of subjective decisionmaking [that] has precisely the same effects as a system pervaded by impermissible intentional discrimination * * * ." *Watson*, 487 U.S. at 990-91.

## II. WHAT ARE REASONABLE FACTORS OTHER THAN AGE, AND HOW DOES THE DEFENSE OPERATE?

The *existence* of disparate impact analysis should be clear. The elephant in the middle of this case, however, is the meaning of "reasonable factors." In *Gunther*, 452 U.S. at 170-71, the Court held that a Title VII defendant facing disparate impact wage-discrimination charges could prevail through the "any other factor other than sex" defense incorporated into Title VII through the Bennett Amendment. To prevail, the employer would have to show that the factor other than sex was both bona fide and sex-neutral. Since Congress chose to add the word "reasonable" to the ADEA's similar defense, it seems logical that a defendant's burden would be greater than a mere showing that its factors were age-neutral and bona fide. How *much* greater is ambiguous, so consideration of the EEOC's interpretation of the term is appropriate.

The EEOC has determined that "[w]hen an employment practice * * * is claimed as a basis for different treatment of employees * * * on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (1999). This standard should apply in ADEA disparate impact cases. If, however, the Court disagrees with the EEOC's interpretation of the ADEA, the analysis in *Wards Cove*, supplemented by the ADEA affirmative defense framework, may provide an appropriate model. ADEA plaintiffs would be able to use the disparate impact method of proving age discrimination, and employers would need to prove that the challenged



action significantly served a legitimate business objective. *Wards Cove*, 490 U.S. at 659. Or, the Court may choose a different model, but—regardless of what meaning the Court attaches to "reasonable factors"—the burden should be on the defendant to prove its affirmative defense.

In this case, if the Adams Group members produce evidence that they were terminated as part of a subjective selection and downsizing process that had a disproportionate impact on Florida Power's older workers, that evidence should be considered a prima facie case of age discrimination. Since Florida Power contends it based its decision to downsize on a need to prepare for competition from deregulation, the case may turn on whether the company was reasonably (or actually) concerned with deregulation—a defense the members of the Adams Group will challenge if given the opportunity to litigate their disparate impact claims.

## CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded to the district court for further proceedings to allow the petitioners to proceed with their disparate impact claims under the ADEA.

Respectfully submitted,

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## APPENDIX

Age Discrimination in Employment Act of 1967,
§ 4(a) & (f), 81 Stat. 603,
Pub. L. 90-202
(Dec. 15, 1967)

SEC. 4. (a) It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade

the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual;

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**29 U.S.C. § 621 Congressional statement of findings and purpose**

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of

meeting problems arising from the impact of age on employment.

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**29 U.S.C. § 622 Education and research program; recommendation to Congress**

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures –

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.



(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

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**29 U.S.C. § 623 Prohibition of age discrimination**

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.



Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an indivfdual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to



subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

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**29 U.S.C. § 625. Administration**

The Secretary shall have the power –

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

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**29 U.S.C. § 626 Recordkeeping, investigation, and enforcement**

* * *

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;



(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and (B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

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**29 U.S.C. § 628. Rules and regulations; exemptions**

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

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**29 U.S.C. § 630 Definitions**

For the purposes of this chapter –

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with

employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or



(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia,

or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.



(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

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## 42 U.S.C. § 2000e-2(a)(2)

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain



instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give

and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except



that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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**29 USC § 206(d) Prohibition of sex discrimination**

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

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**29 C.F.R. § 1625.7**

CODE OF FEDERAL REGULATIONS

TITLE 29 – LABOR

SUBTITLE B – REGULATIONS RELATING TO LABOR

CHAPTER XIV – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1625 – AGE DISCRIMINATION IN EMPLOYMENT ACT

SUBPART A – INTERPRETATIONS

Current through January 1, 2002; 66 FR 67702

§ 1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f) (1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * * .

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.



(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f) (2) exception to the Act.

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**29 C.F.R. 860.103 (1986)**

Chapter V – Wage and Hour Division,
Department of Labor

Subchapter C – Age Discrimination in Employment

Part 860 – Interpretations

**§ 860.103** Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * * "

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the



basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age.

(f)(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: Provided, however. That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs,

underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(ii)(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, where as another individual of age 30 may be physically incapable of doing so.

(ii)(iii)(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do no [sic] have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a



group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation – an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 FR 9173, June 21, 1968]

Authority: 81 Stat. 602; 29 U.S.C. 620, 5 U.S.C. 301, Secretary's Order No. 10-68, and Secretary's Order No. 11-68.

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**29 C.F.R. 860.104 (1986)**

**§ 860.104** Differentiations based on reasonable factors other than age – Additional examples.

(a) Employment of Social Security recipients (a)(1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used

as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(a)(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) Employee testing The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their



schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) Refusal to hire relatives of current employees There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 FR 322, Jan. 9, 1969, as amended at 34 FR 9709, June 21, 1969]

Authority: 81 Stat. 602; 29 U.S.C. 620, 5 U.S.C. 301, Secretary's Order No. 10-68, and Secretary's Order No. 11-68.